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82-1301

No. .....

In The

Supreme Court of the United States

October Term, 1982

SUPREME COURT OF VIRGINIA
AND ITS CHIEF JUSTICE,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 3, 1983

QUESTIONS PRESENTED

1. Did the United States District Court for the Eastern District of Virginia misconstrue this Court's opinion, *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719 (1980) in awarding attorneys' fees against the Supreme Court of Virginia and its Chief Justice when it made such an award upon remand without any evidence that the Supreme Court of Virginia had acted in a direct enforcement role in connection with Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility?

2. Did the United States Court of Appeals for the Fourth Circuit likewise misconstrue this court's opinion when it affirmed that ruling of the District Court?

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CONSUMERS UNION OF THE UNITED STATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Supreme Court of Virginia and its Chief Justice, hereafter collectively referred to as the Virginia Court, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 688 F.2d 218 (4th Cir. 1982). The opinion is reprinted in the Appendix to this petition.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1982. On August 23, 1982, petitioners filed a Petition for Rehearing in banc. That petition was denied

on December 28, 1982. On January 4, 1983, the Court of Appeals for the Fourth Circuit stayed the issuance of its mandate for thirty days pending the filing of a petition for writ of certiorari. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

III.

STATEMENT OF THE CASE

This action was instituted in 1975 by plaintiffs Consumers Union of the United States, Inc. and Virginia Citizens Consumer Council (Consumers Union) against the Supreme Court of Virginia and its Chief Justice in his official capacity, the Virginia State Bar, and others. It was brought before a three-judge District Court. The Complaint sought both declaratory relief and an injunction against enforcement of Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility. That rule, which was virtually identical to the corresponding provision of the Code of Professional Responsibility formulated by the American Bar Association, regulated the discretion of attorneys to advertise their services.

The matter proceeded to trial on May 17, 1976. On December 17, 1976, the District Court declared that the Rule unconstitutionally restricted the right of Consumers Union to receive and gather non-fee information and information concerning initial consulation fees. The District Court enjoined the Virginia Court and the State Bar from enforcing the rule, except for its prohibition against advertising fees for services other than the initial consultation fee. *Consumers Union of United States, Inc.* v. *American Bar Assn.*, 427 F.Supp. 506 (E.D. Va. 1976).

An appeal to this Court followed. This Court vacated the decision of the District Court and remanded for further

consideration in light of its decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). On remand, Consumers Union filed a motion for judgment on the merits and for an award of attorneys' fees and costs under the newly enacted Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

The three-judge District Court, one judge dissenting, directed the Virginia Court "to pay plaintiff's reasonable attorneys' fees in light of their continued failure and apparent refusal to amend [the code] to conform with constitutional requirements." *Consumers Union of United States, Inc.* v. *American Bar Assn.*, 470 F. Supp. 1055, 1063 (E.D. Va. 1979).

After the denial of a Petition for Rehearing in the District Court, the Virginia Court appealed once again to this Court. In that second appeal the primary issue raised by the Virginia Court was whether the Virginia Court was immune from any award of attorneys' fees against it, an issue not raised in the first appeal.

This Court held that the Virginia Court is immune from suit when acting in a legislative capacity. Consequently the three-judge District Court had erred, because an award of attorneys' fees could not properly be predicated upon the Virginia Court's mere promulgation of or failure to amend the Rule—a legislative act:

> . . . [I]t was an abuse of discretion to award fees because the Virginia court failed to exercise its rule-making authority in a manner that satisfied the District Court.

Supreme Court of Virginia v. *Consumers Union of United States, Inc.*, 446 U.S. 719, 739 (1980).

This Court noted that the Virginia Court would not be immune from an award of attorneys' fees based upon the

Virginia Court's "direct enforcement role," if any such role existed. 446 U.S. at 738-39. This Court noted that judgments against "enforcement authorities" ordinarily carried with them attorneys' fees under the Civil Rights Attorney's Fees Award Act. 446 U.S. at 738-39. This Court vacated the award and remanded the matter to the District Court for further proceedings consistent with its opinion. The three-judge District Court, without taking further evidence, and on exactly the same record it had before it when this Court said the District Court had abused its discretion in awarding attorneys' fees, once again awarded attorneys' fees. In a vigorous dissent, District Judge Warriner protested that the District Court had completely misread this Court's opinion and mandate. Judge Warriner further pointed out in his dissent that independent inquiry made it clear that the Virginia Court had not acted in an enforcement capacity, 505 F.Supp. 822, at 829, fn. 10.

In the Fourth Circuit's opinion announced on August 9, 1982, two judges of that court found, in effect, that the District Court did not have to make any independent or new evaluation of the record to determine whether or not the Virginia Court had at any time acted in an enforcement capacity. In a dissent, Judge Chapman pointed out that the majority had misread the opinion of this Court in *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719 (1980). Judge Chapman said, 688 F.2d at 223:

> . . . The U.S. Supreme Court did not find that the Virginia Court was liable for attorney's fees in its direct enforcement role or that such enforcement role played any part in awarding of fees. If this had been the finding, the court would have either affirmed or would have remanded with directions to the district court to find a proper fee.

Judge Chapman said further, 688 F.2d at 223:

> Therefore, the Supreme Court must have remanded for reconsideration of the enforcement role based upon something that was not in the existing record. With no addition to the record, the district court found that the Virginia Supreme Court was liable solely upon its enforcement role under the statute.

IV.

REASONS FOR GRANTING THE PETITION

In its 1980 opinion, after a thorough analysis of statutory and common law immunity, this Court held that the Virginia Court was immune from suit for acts performed in its legislative capacity, 446 U.S. 719 (1980), at 734. This Court correctly found that the District Court's award of fees against the Virginia Court was error because the award "...was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity." Id. at 738. This Court reasoned that:

> [b]ecause the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

Id. at 739.

This Court, in its only reference to a circumstance under which it might be proper to award attorneys' fees against the Virginia Court, stated:

> Nor would we disagree had the District Court awarded fees not only against the Bar but also against

> the Virginia Court because of its own direct enforcement role.

Id. at 739.

Circuit Judge Chapman's dissent points out that this Court could have simply remanded the case to the District Court with instructions to fix the fees if it had concluded that the record showed the Virginia Court had in fact acted in an enforcement capacity. Its failure to do that, choosing instead to remand for further proceedings consistent with its opinion, indicates clearly that this Court expected the District Court to make new inquiry whether the Virginia Court had ever acted in an enforcement capacity.

The differences between the majority and minority opinions in both the District Court and the Fourth Circuit stem from this Court's action in remanding the case for further proceedings. Stated simply, the majorities concluded that the case was remanded simply to determine whether there were special circumstances which would make an award of attorneys' fees unjust. The minorities concluded that this Court remanded for the District Court to determine whether the Virginia Court had acted in an enforcement capacity in the first instance, an indispensable predicate to an award of attorneys' fees.

The portion of this Court's opinion which gives rise to the differing views is found at 446 U.S. 739:

> . . . . Because the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or non-exercise of a state court's legislative powers.
>
> This is not to say that absent some special circumstances in addition to what is disclosed in this record, a

> fee award should not have been made in this case. . . . Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role. However, we hold that it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court. . . .

We submit the dissenters in the District Court and in the Fourth Circuit accurately read this to mean that the correct analysis for the District Court to have made on remand was one requiring two steps. First, the District Court should have taken evidence to determine whether the Virginia Court had ever acted in an enforcement capacity. Then, if, and only if, the District Court found that the Virginia Court had acted in an enforcement capacity, the District Court should next determine whether there were special circumstances which would make an award of fees unjust.

It is clear that the mere possession of enforcement authority does not create any case or controversy absent some evidence that the enforcement authority was exercised, cf. *Boyle* v. *Landry*, 401 U.S. 77 (1971); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); and *Consumers Union*, above, at 736, fn. 15.

In *Poe* v. *Ullman*, 367 U.S. 497, 502, 509 (1961), this Court held that there was no justiciable controversy in a challenge to a state abortion statute. The plaintiffs had failed to show a pattern of enforcement by the defendant state's attorney. The plaintiffs in *Poe* had alleged that the defendant "intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses." 367 U.S. at 501. However, this Court examined the defendant's

actual practice to determine whether there was a "clear threat of imminent prosecutions." 367 U.S. at 501. With only one arrest in twenty years, this Court concluded that there was not a "case or controversy within the meaning of Article III of the Constitution," and dismissed the suit. 367 U.S. at 502, 509.

Similarly, in *Ellis* v. *Dyson,* 421 U.S. 426, 434-35 (1975), this Court reversed a judgment declaring a Dallas loitering ordinance unconstitutional where there was insufficient history of enforcement by the defendants. Although plaintiffs argued that the statute chilled their rights of free speech, association, and assembly, this Court held that two arrests per day did not necessarily create a genuine threat of enforcement. 421 U.S. at 434.

We submit that the clear purpose of this Court's remand in 1980 was for the District Court to determine whether this was another *Poe* or *Ellis* case where theoretical power may reside, but where a right to attorneys' fees exists only if the power is exercised. That is what one of three District Court judges who considered this case on remand thought this Court meant; that is what one of three Circuit Court judges who considered this case on appeal from the District Court thought this Court meant; and presumably that is what three of nine judges in active service on the Fourth Circuit thought this Court meant when the three of them voted in favor of a rehearing in banc.

As Judge Chapman pointed out in his dissent, at 688 F.2d 223, this Court must have remanded for reconsideration of the enforcement role, such reconsideration to be based on facts not yet in the record. Otherwise this Court would simply have remanded with instructions to fix the fees.

Had the District Court on remand found that the Virginia Court had only acted in a judicial or rulemaking ca-

pacity, not an enforcement capacity, that would have been the end of the matter. On the other hand, had the District Court taken evidence and found that the Virginia Court had acted in an enforcement capacity it would have had to make the second step of the analysis—to determine whether under the circumstances an award of fees against the Virginia Court would be unjust.

The error of the majority of the District Court and of the Fourth Circuit was in omitting the first step of the analysis. The District Court and the majority of the Fourth Circuit found merely that there were no special circumstances which would have rendered the award of fees unjust. They failed to reach the crucial threshold question whether there was any basis for finding that the Virginia Court had acted in its enforcement capacity in the first instance.

The error of the courts below in approving attorneys' fees against the highest court of Virginia without any evidentiary basis is magnified by considerations forcefully articulated by this Court in *Nixon* v. *Fitzgerald,* 457 U.S. ——, 102 S. Ct. 2690 (1982). The issue there was the immunity of the President of the United States from civil suit for acts in his official capacity. The majority and concurring opinions in *Nixon* do not discuss the *Consumers Union* opinion. The dissenters mention it only in a footnote. There is neither frontal assault on, nor affirmation of, *Consumers Union* in *Nixon.* However, this Court drew heavily on traditional judicial immunity analogy to sustain its conclusion that the President is absolutely immune from civil suit.

On two occasions in Justice Powell's majority opinion (pp. 2700 and 2703) and on three occasions in Chief Justice Burger's concurring opinion (pp. 2070 and 2709),

members of this Court stated without qualification that prosecutors and judges have absolute immunity from civil suit. If they have such complete immunity, it must inevitably follow that a court is without jurisdiction to award attorney's fees against judges in civil actions because their absolute immunity defeats jurisdiction in the first instance.

In discussing immunity in *Nixon* the Court said, at p. 2700:

> . . . [T]he especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e.g.*, *Imber* v. *Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U.S. 349, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978) (state judge possesses absolute immunity for all judicial acts.)

Again at page 2703:

> . . . . As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings."

Chief Justice Burger, in his concurring opinion, stated at page 2707, fn. 2:

> . . . . Absolute immunity for judges and prosecutors is seen to derive from the common law and public policy, which recognize the need to protect judges and prosecutors from harrassment. . .

And in his conclusion the Chief Justice pointed out, at page 2709:

> . . . . Far from placing a President above the law,

> the Court's holding places a President on essentially the same footing with judges and other officials whose absolute immunity we have recognized.

It must be recalled that it is in its prosecutorial or enforcement capacity that the Virginia Court has been held liable for attorneys' fees. Yet it is prosecutors and judges who are held to be absolutely immune from civil liability for their prosecutorial or judicial acts. There may be an exception to this rule of immunity created by the enactment of the Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. However, as in any other statute in derogation of common law it should be strictly construed. In light of the Court's so recent emphasis on the historical immunity of the judiciary from civil suit, surely the highest court of a sovereign state is entitled to have some evidence introduced against it that it has acted in an enforcement capacity before it is condemned to pay attorneys' fees for having acted in such capacity. If principles of comity do not necessitate that elemental right, principles of fundamental justice do.

At the very minimum, the continued emphasis in the *Nixon* opinion on the absolute immunity of judges and prosecutors means that in only in the most unusual and exceptional cases should that immunity be breached. Certainly, then, an award of attorneys' fees against the Virginia Court for its enforcement activities cannot be justified without some clear and convincing evidence that the Virginia Court acted in that capacity. The existence of such evidence is nonexistent because of the failure of the District Court to consider any further or additional evidence in addition to the evidence it has previously considered—evidence this Court found to constitute activity in the Virginia Court's legislative or rulemaking capacity, not in its enforcement capacity.

We do not urge the grant of a writ of certiorari here simply to go through a trial which will result in a clear finding that the Virginia Court acted time and again in a direct enforcement role. The frustrating part of the case to petitioners is that had the District Court taken evidence and made findings it would have found that the Virginia Court never acted in an enforcement capacity.

V.

CONCLUSION

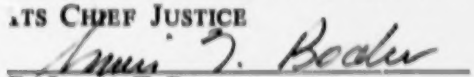
Lower courts may and do speculate on what this Court had in mind when it remanded the case for further proceedings. Only this Court knows for certain what it meant the District Court to do. The construction by the majority in the District Court and the Circuit Court is a strained one. That construction effectively overrules what this Court decided in the *Poe* and *Ellis* cases. That cannot have been the intention of this Court upon remand.

The Virginia Court urges this Court to vacate the judgment below and remand this matter to the District Court with instructions to expand the record and make explicit findings whether or not the Virginia Court ever acted in an enforcement capacity. Only if the District Court finds that the Virginia Court did act in an enforcement capacity should it then move to the second step of the analysis and determine

whether there are special circumstances which would make an award of attorneys' fees unjust.

Respectfully submitted,

SUPREME COURT OF VIRGINIA AND ITS CHIEF JUSTICE



By LEWIS T. BOOKER

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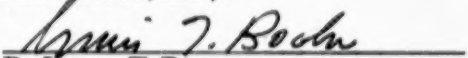
CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court I this day served three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon each counsel for all of the parties required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

(1) Robert H. Patterson, Jr., O. Randolph Rollins, Anne Marie Whitemore, Judith B. Henry, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219 (counsel to the Virginia State Bar),

(2) Ellen Broadman, Mark Silbergeld, Consumers Union of United States, Inc., 3rd Floor, 1146 19th Street, N.W., Washington, D.C. 20036, and

(3) James W. Benton, Jr., Hill, Tucker & Marsh, P.O. Box 27363, Richmond, Virginia 23261 (counsel to Consumers Union of the United States, Inc.).



By LEWIS T. BOOKER

Date: February 3, 1983

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0105-R

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Plaintiffs,

v.

AMERICAN BAR ASSOCIATION, ET AL.,
Defendants.

Before BRYAN, Senior Circuit Judge, MERHIGE and WARRINER, District Judges.

ORDER ON ALLOWANCE OF ATTORNEY'S FEES

Upon the opinion of this Court filed January 8, 1981, it is now

ORDERED that the Supreme Court of Virginia and its Chief Justice, in their official capacities, pay to the Consumers Union of the United States, Inc., a reasonable sum as attorney's fees for the services of its counsel in this action, the amount of such payment to be agreed upon between the said parties within thirty (30) days of the entry of this order, failing which this Court shall, immediately or through reference to a master, determine the amount to be allowed to the claimant therefor and to be adjudged against the Supreme Court of Virginia.

Done for this Court this 8th day of January, 1981.

/s/ Albert V. Bryan
Senior United States Circuit Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0105-R

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Plaintiffs,

v.

AMERICAN BAR ASSOCIATION, ET AL.,
Defendants.

Argued: October 3, 1980 Decided:

Before BRYAN, Senior Circuit Judge, MERHIGE and WARRINER, District Judges.

James W. Benton, Jr., Hill, Tucker & March, Ellen Broadman, Peter H. Schuck and Marsha N. Cohen, attorneys for plaintiffs, Robert H. Patterson, Jr., Judith B. Henry, Randolph Rollins, Anne Marie Whittemore, Walter H. Ryland, Deputy Attorney General of Virginia, John F. Rick, attorneys for defendants; Robert D. McLean, H. Blair White, Sidley & Austin, associate counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

This action has been pending since 1975 before us, sitting as a three-judge tribunal, with appeals at intervals to the Supreme Court of the United States. It has now been refined to the sole question of whether the plaintiff, Consumers Union of the United States, Inc. (Consumers),

having prevailed under 42 U.S.C. § 1983 on its assertion that Virginia Bar Code Disciplinary Rule 2-102(A)(6) (the Rule) unconstitutionally hindered its publication of a directory of attorneys practicing in Arlington County, Virginia,[1] is entitled to recover attorney's fees under 42 U.S.C. § 1988 from the Virginia State Bar (Bar) and/or the Supreme Court of Virginia (Virginia Court).[2]

Detailed reiteration of the earlier course of this litigation is rendered unnecessary by the comprehensive opinion of the United States Supreme Court in *Supreme Court of Virginia* v. *Consumers Union of the United States*, 48 U.S.L.W. 4620 (June 2, 1980). Therein the Court relates the constituent facts, with the rulings of this Court thereon, that induced us to allow Consumers' claim for attorney's fees against the Virginia Court, while disallowing a like claim against the Bar. *See id.* at 4621-23.

The Supreme Court vacated the award of attorney's fees because it rested in part on consideration of the Virginia Court's adoption, and retention even after *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), of the disputed disciplinary provision—actions the Supreme Court held to enjoy absolute legislative immunity. 48 U.S.L.W. at 4625. On remand we again consider the propriety of a fee award against each defendant.

We adhere to the view, previously expressed in *Consumers Union of United States, Inc.* v. *American Bar Association*, 470 F.Supp. 1055 (E.D. Va. 1979), that spe-

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[1] Consumers Union of United States, Inc. v. American Bar Association, 470 F.Supp. 1055 (E.D. Va. 1979). The award of attorney's fees in this case, *id.* at 1058-63, was vacated, Supreme Court of Virginia v. Consumers Union of the United States 48 U.S.L.W. 4620 (June 2, 1980), and is before us again on remand.

[2] Unless otherwise indicated, references herein to the Supreme Court of Virginia include its Chief Justice in his official capacity.

cial circumstances exist in this case rendering a fee award against the Bar unjust. As before, this conclusion is grounded on the Bar's endeavors to have the Bar Code amended to conform to constitutional standards. *See id.* at 1062-63.

The Supreme Court, even as it vacated this Court's fee award, indicated that the Virginia Court's capacity as a State enforcement authority rendered it properly subject to suit in this case. 48 U.S.L.W. at 4620-21, 4623-25. Moreover, it emphasized that a fee award based solely on the Virginia Court's enforcement role would not be improper. *Id.* at 4625.

The Virginia Court is a fundamental source and conduit of disciplinary enforcement authority. Although the Bar may be more active in this sphere on a day-to-day basis, it acts merely as an "administrative agency of the Court."[3] It seems clear that "in the circumstances of this case, a sufficiently concrete dispute is. . . made out against the Virginia Court as an enforcer," 48 U.S.L.W. at 4624 n.15, not only for amenability to suit, but also for the purpose of a fee award to Consumers, the prevailing party.

Nothing in the Supreme Court's opinion casts doubt on the propriety of this Court's earlier application of *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), to this case.[4] Under that standard, a court ordinarily should award reasonable attorney's fees to a prevailing civil rights plaintiff "unless special circumstances would render such an award unjust." *Id.* at 402.

Upon review of the record throughout this litigation, we conclude that no special circumstances have been shown

[3] Va. Code § 54-49.

[4] *See* 470 F.Supp. at 1061. The Supreme Court noted the application of *Piggie Park*, and commented briefly thereon. 48 U.S.L.W. at 4625 & n.17.

that would render unjust an award of attorney's fees against the Supreme Court of Virginia. Accordingly, we will order the Supreme Court of Virginia and its Chief Justice, in their official capacities, to pay to Consumers reasonable attorney's fees for the services of its counsel in this action, insofar as such services were performed to prevent the enforcement of the Rule. The amount of the fees, if not agreed upon between the Supreme Court of Virginia and Consumers within 30 days from the date of our order, shall be determined by this Court directly, or after reference to and report thereon by a master.

Order follows.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0105-R

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL
v.
AMERICAN BAR ASSOCIATION, ET AL

WARRINER, District Judge, dissenting in part and concurring in part.

I dissent from the majority opinion with respect to its award of attorney's fees against the Supreme Court of Virginia.[1] Insofar as the opinion speaks to the Virginia State Bar, I concur in the result only.

I.

My dissent with respect to the fee award against the Virginia Court can be understood best by examining the record. Plaintiffs sought a declaratory judgment that the Virginia Court and the State Bar had violated the First and Fourteenth Amendment rights of plaintiffs and their members to gather, publish, and receive information regarding lawyers in Arlington County, Virginia. Plaintiffs also sought an injunction against the enforcement of the rule prohibiting advertising by lawyers, DR2-102(A)(6) of the Code of Professional Responsibility of the Virginia State Bar. The Complaint alleged that the Virginia Court had

[1] Reference to the Supreme Court of Virginia, or to the Virginia Court, includes its Chief Justice in his official capacity.

promulgated the Code[2] and that the State Bar had the delegated authority to enforce the Code. *Consumers Union of United States, Inc.* v. *American Bar Ass'n.*, 427 F.Supp. 506, 508 (E.D.Va. 1976). The majority of this Court concluded in its original opinion that plaintiffs had a First Amendment right to gather, publish, and receive consumer information about lawyers, save for fee information.[3] *Id.* at 523. Accordingly, the majority held that insofar as DR2-102(A)(6) prohibited the advertising of not inherently misleading or deceptive consumer information, with the above exception, the public's right to the information was paramount, and the rule was *pro tanto* invalid. *Id.* at 521-23. In addition to this declaratory judgment, the Virginia Court and State Bar were enjoined from enforcing the rule. *Id.* at 523.

All parties appealed to the United States Supreme Court. The majority opinion was vacated and the case was remanded for "further consideration in light of *Bates* v. *State Bar of Arizona* [433 U.S. 350 (1977)]." *Consumers Union of United States, Inc.* v. *Virginia State Bar*, 433 U.S. 917 (1977). In light of *Bates*, we held on remand that the prior exception against fee advertising could no longer be maintained and that plaintiffs were entitled to gather and publish, and their members were entitled to receive, truthful information about lawyers, including fee information. *Consumers Union of United States, Inc.* v. *American Bar As-*

[2] The sole allegation in the Complaint implicating the Supreme Court of Virginia in any way reads as follows:

> Defendant Supreme Court of Virginia adopted and promulgated the State Bar Code, purporting to act under the authority of § 54-48 of the Virginia Code.

Complaint, ¶3.

[3] The concurring judge, the writer of this dissent, held that fee advertising, except for the fee charged for an initial interview, was inherenty misleading. 427 F.Supp. at 525 (Warriner, J., concurring).

sociation, 470 F.Supp. 1055, 1058 (E.D.Va. 1979). Thus, DR 2-102(A)(6) was struck in its entirety and the Virginia Court and the State Bar proposed and consented to the entry of a decree enjoining them from enforcing the invalidated rule.

Plaintiffs then asked for an award of costs, including attorney's fees under 42 U.S.C. § 1988. The majority of this Court held first that the Virginia Court was not protected by judicial immunity from an award of attorney's fees for acts performed in its "judicial capacity." 470 F.Supp. at 1059-63. Second, finding no "special circumstances" rendering an award of attorney's fees unjust, *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), the majority required the Virginia Court to pay a reasonable counsel fee to be determined by this Court. The clearly stated basis for the award was that the Virginia Court was recalcitrant in amending or repealing DR 2-102-(A)(6) after *Bates*. 470 F.Supp. at 1062-63. The State Bar, on the other hand, had petitioned the Virginia Court, even prior to *Bates*, to amend the rule to conform to what it deemed to be constitutional standards. This was considered by this Court as a special circumstance rendering an award of attorney's fees against the Bar unjust. 470 F.Supp. at 1062-63.

In my dissenting opinion I raised the argument that the promulgation of the Bar Code by the Virginia Court was not an act of adjudication but one of rulemaking. 470 F.Supp. at 1063-73. I concluded that the Virginia Court enjoyed absolute legislative immunity from suit in performing this rulemaking function. Thus, the Virginia Court was immunized from an award of attorney's fees. I concluded also that the Virginia Court should have been dismissed from the action entirely on the basis of its legislative

immunity even though its counsel had not pled nor argued this defense. *Id.* at 1073 n. 6.

On appeal, the United States Supreme Court disagreed with the majority opinion that promulgation of the Code was a judicial act. "[P]ropounding the Code was not an act of adjudication but one of rulemaking." *Supreme Court of Virginia* v. *Consumers Union of United States,* 48 U.S.L.W. 4620, 4623 (2 June 1980). The Supreme Court agreed with the dissenting opinion that the Virginia Court was cloaked with absolute legislative immunity from suit itself for actions in its legislative capacity. 48 U.S.L.W. at 4623-24.

Instead of dismissing the Virginia Court from the action at this point, the Supreme Court went further and concluded that "the Virginia Court and its Chief Justice properly were held liable in their enforcement capacities." 48 U.S.L.W. at 4624. The basis for this conclusion was apparently twofold. First, the Virginia Court had for some reason argued before the Supreme Court that it had inherent and statutory authority to discipline and regulate the Virginia Bar. The Supreme Court accepted this admission and held that this enforcement authority makes the Virginia Court a proper defendant in a suit under 42 U.S.C. § 1983 for declaratory and injunctive relief. 48 U.S.L.W. at 4624 & 4624 n. 15. Second, in light of the *Bates* decision the Virginia Court and the State Bar had accepted that DR 2-102(A)(6) could no longer be enforced against attorneys who provide plaintiffs with the desired information. The Virginia Court and State Bar therefore had proposed and consented that they be permanently enjoined from enforcing the by then unenforceable rule. Accordingly, in our final order, consistent with the parties' consent, we enjoined the Virginia Court and the State Bar from enforcing the rule. *See* 43 U.S.L.W.

at 4622 & 4622 n. 6. Thus, apparently reasoned the Supreme Court, since the Virginia Court claimed it had enforcement functions and since it had consented to be enjoined from exercising that function, a routine § 1983 settlement had taken place.[4]

With all respect I submit that the Supreme Court's ruling with respect to the Virginia Court is somewhat contradictory. The Court recognized at the outset of its opinion that plaintiffs' complaint "alleged only that the court promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code." 48 U.S.L.W. at 4622. In addition, the Supreme Court recognized that the extent of the Virginia Court's statutory enforcement power is that it, along with all Virginia courts, may issue a rule against an attorney to show cause why his license to practice law should not be suspended or revoked. 48 U.S.L.W. at 4621. Beyond this, the role of the Virginia Court or any other court of record is wholly and simply adjudicative. The actual prosecution is by the Commonwealth's attorney. *See* Va. Code § 54-74 (Cum. Supp. 1980). Nevertheless, the Supreme Court concluded that "the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt." 48 U.S.L.W. at 4621. The Supreme Court did not disclose the basis for this conclusion, and I can discern none. Indeed, the Virginia Court and other

[4] The Supreme Court had this to say:

> As already indicated, [Va. Code § 54-74 (Repl. Vol. 1978)] gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.

48 U.S.L.W. at 4624. *See also Id.* at 4624 n. 15.

courts in Virginia exercise their contempt power in essentially the same manner as they exercise their authority over a lawyer in a disciplinary matter. *Compare Holt* v. *Virginia*, 381 U.S. 131, 132 (1965) (Virginia judge directed Commonwealth's attorney to prepare order directing lawyer to show cause why he should not be punished for contempt) *with* Va. Code § 54-74 (Cum. Supp. 1980) (Virginia Court or other court of Virginia issues a rule against attorney to show cause why his license to practice law should not be suspended or revoked; prosecution is by Commonwealth's attorney). Thus, the Virginia Court's enforcement authority under § 54-74 is not readily, if at all, distinguishable either functionally or legally from its contempt power.[5]

With respect to attorneys fees, the Supreme Court pointed out that this Court had premised its award on acts or omissions for which the Virginia Court enjoyed absolute legislative immunity. 48 U.S.L.W. at 4625. The Supreme Court held that this Court erred in basing the award of attorney's fees on the Virginia Court's failure to amend or repeal DR2-106(A)(6).

> [I]t was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court.

Id. By way of *dictum*, the Supreme Court stated that it would not be improper to award attorneys fees based upon the Virginia Court's enforcement role. *Id.*

The majority opinion of this Court on remand has accepted this *dictum* as a command. With dispatch, the majority has ordered the Virginia Court and its Chief Justice

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[5] The only possible distinction is that the contempt power may be exercised summarily, whereas the enforcement authority may not. *See* Va. Code § 54-74 (Cum. Supp. 1980).

to pay plaintiffs' reasonable attorney's fees, "insofar as such services were performed to prevent the enforcement of the Rule." *Ante*, at ——. The majority finds support for its decision in its view that the Supreme Court vacated

> the award of attorney's fees because it rested *in part* on consideration of the Virginia Court's adoption, and retention even after *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), of the disputed disciplinary provision —actions the Supreme Court held to enjoy absolute legislative immunity. 48 U.S.L.W. at 4625.

Ante, at ——. (Emphasis added). This contention is erroneous. The majority's award of attorney's fees was based *entirely* on the Virginia Court's legislative role. No reading of the majority opinion admits to any other conclusion. *See* 470 F.Supp. at 1062-63. The Supreme Court has so held:

> The District Court's award of attorney's fees in this case was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity.

48 U.S.L.W. at 4624. If the fee award had rested only "in part" on the Virginia Court's legislative role, the Supreme Court may not have vacated and remanded; it most properly would have affirmed, stating the correct basis for the award, *e.g.*, the Virginia Court's enforcement role, and would have remanded only for a determination of reasonable fees.[6] Because this Court's award of attorney's fees was wholly in error the judgment was vacated and remanded instead.

Admittedly, the Virginia Court possesses the inherent and statutory authority to discipline and regulate the Virginia Bar. It is also true that we, in our pre-*Bates* opinion,

[6] Indeed, had there been any proven basis in the record for the award of fees, the Supreme Court would not have awarded costs on appeal in favor of the Virginia Court. The Virginia Court clearly prevailed on appeal with respect to the attorney's fees issue.

enjoined the Virginia Court together with the State Bar from enforcing DR 2-106(A)(6). After *Bates*, the Virginia Court consented to the entry of a decree enjoining it and the State Bar from enforcing the invalid rule against lawyers who provided the information plaintiffs sought. Strictly speaking, then, it could be said that plaintiffs prevailed against the Virginia Court in its enforcement capacity.[7] Consequently, the Supreme Court has concluded that we properly held the Virginia Court liable in its enforcement role under § 1983 and has now foreclosed an examination here of that issue.

The point of my dissent, then, is that we are not foreclosed from re-examining the nature and extent of the Virginia Court's § 1983 liability in its enforcement capacity as it relates to the discretionary award of judgment against the Virginia Court for plaintiffs' counsel fees. Indeed, the Supreme Court has not commanded an award as the majority here supposes, but has directed that we consider the Virginia Court's "own *direct* enforcement role" in assessing attorney's fees. 48 U.S.L.W. at 4625. (Emphasis added).

It is true that "[f]ee awards against enforcement officials are run-of-the-mill occurrences. . . ." 48 U.S.L.W. at 4625. In fact, it is the general rule that attorney's fees are ordinarily awarded under § 1988 to prevailing civil rights plaintiffs "unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, supra,* at 402. With respect to the inquiry into the existence of "special circumstances," the Fourth Circuit has instructed:

> If this inquiry is needed, it should. . . be an intensely pragmatic one. Its focus is rightly upon the justice

[7] As demonstrated within, no such explicit holding emanated from this Court for the simple reason that no such issue was ever presented to this Court. It was actually the Supreme Court of Virginia which, on appeal, injected its enforcement role into the litigation.

> under the total range of circumstances of conferring the benefit and imposing the concomitant burden represented by the fee award.

Bonnes v. *Long*, 599 F.2d 1316, 1319 (4th Cir. 1979). The court's discretion is to be exercised bearing in mind the purpose of § 1988 to encourage "private attorney general" suits. *Id.* It is inconsistent with the requirement of "an intensely pragmatic" inquiry to look at isolated phrases from the Supreme Court's opinion and pre-emptorily award counsel fees as the majority opinion has done. Instead, the inquiry must focus "upon the justice under the total range of circumstances" of awarding attorney's fees in this case.

The most careful examination of the record reveals that the issue of the Virginia Court's enforcement role was never presented to us. Prior to *Bates* there were no allegations, no proffers of evidence, no briefs, no arguments, and no findings of fact by this Court with respect to the direct or even the indirect enforcement role of the Virginia Court. The allegations and proofs showed no more than that the Virginia Court had adopted the Bar Code and had promulgated a procedure for enforcement of the Code. In practice the Virginia Court's day-to-day enforcement authority had been delegated to the State Bar and the various district committees. Va. Code § 54-49 (Repl. Vol. 1978); Rules for the Integration of the Virginia State Bar, Part Six, Section IV, Subsection 13, 215 Va. 859, 946-49 (1975). It was as likely as not, under the record before us, that Virginia lawyers were personally opposed to advertising as it was that they refrained for fear of any prosecution by the Virginia Court. The issue, it must be repeated, simply was not alleged, proved, argued, or otherwise developed in the litigation in the trial court. This is a significant factor in determining whether plaintiffs are entitled to attorney's fees be-

cause of their efforts, prior to *Bates*, to enjoin the enforcement of the rule by the Virginia Court. They made none.

After *Bates*, the issue of the Virginia Court's enforcement role again was not raised by plaintiffs. This is not at all surprising. At this time, plaintiffs, along with all informed attorneys in the United States, knew that lawyers were free to advertise so long as the information was not deceptive or misleading. No one reasonably would have contended that DR2-106(A)(6) could be enforced at that time.[8]

Plaintiffs argued for the first time on remand that the Virginia Court has a "direct" enforcement role. This contention obviously has been grasped by plaintiffs as a result of the Supreme Court's suggestion that an award of fees against the Virginia Court in its enforcement capacity would not be improper. The record indicates, as I have attempted to demonstrate above, that plaintiffs never alleged nor proved in this case that the Virginia Court had a direct enforcement role with respect to Virginia lawyers.[9] As a prac-

[8] This Court's post-*Bates* opinion related the following incident:

> In December, 1978, a Virginia Beach, Virginia, attorney was indicted under two Virginia statutes for publication of an advertisement that was virtually identical to the advertisement which the Supreme Court in Bates found constitutionally protected, but which DR2-102(A)(6) still prohibited. The chilling effect of DR2-102(A)(6) on First Amendment freedoms is yet extant, even if not subject to objective calculations.

470 F.Supp. at 1062.

While this recitation of alleged facts *aliunde* the record has emotional appeal, it had no legal significance in this case. The Virginia Beach lawyer was not prosecuted by the Virginia State Bar or by the Virginia Supreme Court. Neither entity had brought the charges. Further, the lawyer was not prosecuted under DR2-106(A)(6) or any other rule promulgated by or subject to be enforced by defendants. He was prosecuted by a local Attorney for the Commonwealth under statutes enacted by the General Assembly. If this incident tends to prove anything it tends to prove that defendants were *not* enforcing the defunct advertising ban.

[9] In addition, it should be noted that as a matter of law and fact the Virginia Court could not have disciplined or punished plaintiffs

tical matter plaintiffs could not have so alleged or proved. The Virginia Court's so-called enforcement role is simply the authority to issue a rule to show cause against an offending attorney[10] in essentially the same manner as it would exercise its contempt power against an attorney. *See* Va. Code § 54-74(1) (Cum. Supp. 1980). The day-to-day au-

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in its enforcement capacity. Unlike Virginia lawyers, plaintiffs were not threatened by prosecution for violation of DR2-106(A)(6). Plaintiffs simply could not obtain the information sought to publish their directory because attorneys chose for whatever reason to obey the rule or to follow their own sense of propriety. Plaintiffs' First Amendment rights were thwarted, but were not "chilled." "Chilling" is philosophically and legally distinguishable from "thwarting." A citizen is chilled in the exercise of his rights when the State puts him in fear to deter him from the free exercise of his rights. Another citizen who is thereby denied an opportunity to hear the chilled citizen is thus thwarted. Both have protectable rights, but the citizen put in fear by the State elicits greater concern from the law.

This is not to suggest that plaintiffs were not entitled to vindicate their constitutional rights. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57, 763-65 (1976); Consumers Union of U.S. v. American Bar Ass'n, 427 F.Supp. at 517. As was observed at oral argument before this Court on remand, it matters not to the plaintiff who wields the buzz saw if he is being chewed up. It does matter, however, to the indiscriminately sued defendant who wielded not the buzz saw, in this case, the Virginia Court. The Virginia Court could only have affected plaintiffs in its legislative capacity as a result of its promulgation of the Bar Code. In this capacity the Virginia Court was immune from suit. 48 U.S.L.W. at 4623. It is thus unjust to award fees against the Virginia Court in an enforcement capacity, a capacity in which the Virginia Court was powerless as against plaintiffs.

[10] In practice the issuance of such a rule is a rarity. Almost all complaints against offending lawyers emanate from sources other than the Supreme Court of Virginia. Inquiry of Allen L. Lucy, who has been Deputy Clerk and Clerk of the Supreme Court of Virginia, successively, since 1952, revealed that the Supreme Court of Virginia has issued less than a half dozen rules to show cause against offending lawyers in nearly thirty years.

This special inquiry was necessary to get a glimpse as to what the evidence might have been had plaintiffs alleged or attempted to prove the Virginia Court had exercised enforcement authority in this case.

thority to investigate and to report Bar Code violations to the Circuit Courts is vested in the State Bar through its several district committees. Rules for the Integration of the Virginia State Bar, Part Six, Section IV, Subsection 13, 215 Va. 859, 946-49 (1975). The actual prosecution of a violation is by the attorney for the Commonwealth in the Circuit Courts of the State. Va. Code § 54-74(3) (Cum. Supp. 1980). By statute the Virginia Court is, then, relegated to the adjudicative function of hearing Bar Code violation appeals. Va. Code § 54-74(5) (Cum. Supp. 1980). Whatever inherent or statutory enforcement role may be possessed by the Virginia Court, as a practical matter its *exercise* of power in virtually all cases is as a court of appeals of Bar Code violations.

That the Virginia Court ever consented to be included in the injunction prohibiting enforcement of DR2-106(A)(6) was an error resulting entirely from this Court's and defense counsel's lack of assiduousness, and not from plaintiffs' efforts to enjoin "enforcement" of the rule by the Virginia Court. Indeed, had the defense of legislative immunity been raised in the initial stages of the law suit the Virginia Court would have been dismissed out of hand. The defense of legislative immunity was overlooked.[11] As a result, the Virginia Court was permitted to be included as an injunctive defendant in both the majority's pre- and post-*Bates* injunction orders. This pleading lapse does not justify an award of attorney's fees against the Virginia Court. Indeed, such a circumstance is a "special circumstance" rendering an award of fees unjust.

In summary, I believe it is an abuse of discretion to award

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[11] It is clear that the defense had not been waived by the Virginia Court as is evidenced by the Supreme Court's decision. *See* 48 U.S.L.W. at 4623-24. *See also* 470 F.Supp. at 1071-72.

attorney's fees against the Virginia Court for not doing that which it was not alleged to have done; for not doing that which it was not proved to have done; for not doing that which, as against plaintiffs, it could not have done; and for not doing that which, in practice, it rarely does. Such an award would do nothing to further the purpose of § 1988 to encourage "private attorney general" suits. Rather, an award against the Virginia Court in its so-called enforcement role, based upon the record in this case, would simply be a determination that the fee should be paid by the Virginia Court without regard to the justice of the case.

II.

With respect to the State Bar, I concur with the result in the majority opinion but for a different reason. The majority has concluded that "the Bar's endeavors to have the Bar Code amended to conform to constitutional standards . . ." constitute special circumstances rendering a fee award unjust. *Ante,* at ..... This conclusion slips into the same error as did the majority's earlier opinion.[12] 470 F. Supp. at 1058-63. It focuses on legislative rather than enforcement activity.

If the fact that the State Bar lobbied the Virginia Court

[12] I can only assume, but not conclude, that our finding of special circumstances with respect to the State Bar was in error because the Bar's separate appeal was vacated and the case was remanded "for further consideration in light of *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.,* 446 U.S. —— (1980)." Consumers Union of United States v. Virginia State Bar, No. 79-185 (U.S. Sup. Ct. 9 June 1980). However, the Supreme Court did not specifically rule nor indicate in *Consumers Union* that our finding with respect to the State Bar was "clearly erroneous." *See* 48 U.S.L.W. at 4625. *See generally,* United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948) (interpreting Fed.R. Civ.P. 52(a)). The Supreme Court merely stated that "[w]e are not convinced that it would be unfair to award fees against the State Bar. . . ." 48 U.S.L.W. at 4625.

for legislation to amend the Code is relevant at all, it is because it demonstrates, first, that the Bar was unwilling to enforce the rule against advertising and, second, that the Bar was not antagonistic to plaintiffs' claim for relief. Nevertheless, when the Virginia Court rejected the State Bar's petition for amendment to DR2-206(A)(6), the Bar was duty bound, as the Virginia Court's administrative agency for the regulation of the practice of law,[13] to defend the rule. In this context, the State Bar was required to defend on proper legal grounds a rule it believed to be unconstitutional. When the rule was ultimately struck down as unconstitutional, the State Bar was enjoined from enforcing it.[14] Technically, then, plaintiffs prevailed against the State Bar, even though the Bar was not opposed to the result. Under these circumstances, I cannot in good conscience require the Bar to pay attorney's fees simply because plaintiffs were technically the "prevailing parties."

In addition, it would be unfair to award fees against the State Bar for dutifully defending DR2-106(A)(6). This might not be true if the rule had been widely perceived, pre-*Bates*, as unconstitutional. This was not the case, however. The ban on lawyer advertising was a time-honored and universally accepted regulation of the practice of law. Its constitutionality was not seriously questioned prior to *Bates*, in which the Supreme Court held, in a 5 to 4 decision, that attorneys have a First Amendment right to advertise truth-

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[13] *See* Va. Code § 54-49 (Repl. Vol. 1978).

[14] It should be remembered that in Virginia, the State Bar is not the repository of enforcement authority. As the Supreme Court recognized, the Bar's actual enforcement authority is vested in district committees. 48 U.S.L.W. at 4621. Nevertheless, the Supreme Court said *in dictum* that it would not be unfair to award fees against the State Bar in its enforcement capacity. *Id.* at 4625. Here again the factual basis for the Supreme Court's opinion is not apparent in the trial record so far as this writer can discern.

ful information about their profession. Before the *Bates* decision the State Bar could have avoided its duty to defend DR2-106(A)(6) only by pretending that this historical basis for the rule did not exist. Instead, the Bar did its best to defend the rule which it had not promulgated and did not fully support. To require the State Bar to pay plaintiffs' counsel fees under these circumstances would be a warning to all defendants similarly situated that they defend at their peril. In doubtful, but expensive litigation, the courts will be witnessing a "dive," in boxers' parlance, rather than the vigorous defense our adversary system demands. Congress could not have intended this result when it enacted § 1988.

These circumstances are also significant as they relate to the State Bar's "good faith." Though the Supreme Court has ruled that "bad faith" is not necessary for an award of attorney's fee under § 1988, *Hutto* v. *Finney*, 437 U.S. 678, 693-700 (1978), the Court has not ruled that a party's good faith cannot at least be considered as a special circumstance in determining whether an award of fees is appropriate. *See* 470 F.Supp. at 1074 (Warriner, J., dissenting). Accordingly, the State Bar should not be required to pay plaintiffs' counsel fees where it defended the rule on proper legal grounds after making a good faith effort to have the Bar Code amended to reflect its perceived standards of constitutionality, and where it made a good faith effort to reach an amicable settlement between the parties after *Bates*.

On the basis of these special circumstances, an award of attorney's fee against the Supreme Court of Virginia and against the Virginia State Bar would be unjust and properly should be denied.

D. DORTCH WARRINER
U.S. District Judge

5 January 1980

MERHIGE, J.

I concur with the views expressed in Judge Bryan's succinct and learned opinion and write briefly in response to the dissent of my colleague, Judge Warriner.

While concluding it fruitless to address in any detail the views expressed in the dissent, I suggest that adoption of those views would, to a great extent, represent a rejection of Virginia's highest court's expressed opinion of its statutory and inherent enforcement authority. *See Button* v. *Day*, 204 Va. 547, 132 S.E.2d 292.

I decline, out of respect for the opinions of the Supreme Court of Virginia and the Supreme Court of the United States, as well as a duty to follow the law as enunciated by the Supreme Court, to ignore that of which I have judicial notice. *See Gormly* v. *Bunyan*, 138 U.S. 623, 635 (1890); *Mills* v. *Green*, 159 U.S. 651, 657 (1895).

Additionally contra to Judge Warriner's expressed statements, the record amply supports and mandates the action the court this day takes.

Lest, however, one mistakenly attributes this response as a total rejection of the statements contained in the dissent, I acknowledge my concurrence with Judge Warriner's view that "Plaintiffs' First Amendment rights were thwarted. . . ." The complete statement reads, "Plaintiffs' First Amendment rights were thwarted, but were not 'chilled' "[1]. If, as I conclude, it is intended to suggest that a "thwarting" of one's First Amendment rights is less onerous that the "chilling" of one's First Amendment rights, my rejection is total.

[1] Footnote 9 of the dissent.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1155(L)

CONSUMERS UNION OF UNITED STATES, INC.;
VIRGINIA CITIZENS CONSUMER COUNCIL,

Appellees,

versus

VIRGINIA STATE BAR; JAMES C. ROBERTS,
in his capacity as President of the Virginia State Bar;
ALEX MAYO,
in his capacity as Chairman of the Legal Ethics Committee,
Virginia State Bar,

Defendants,

and

SUPREME COURT OF VIRGINIA;
HON. LAWRENCE I'ANSON,
individually and in his capacity as Chief Justice of the
Supreme Court of Virginia,

Appellants.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

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Virginia State Bar,
Defendants,

and

SUPREME COURT OF VIRGINIA;
HON. LAWRENCE I'ANSON,
individually and in his capacity as Chief Justice of the
Supreme Court of Virginia,
Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr.; Robert R. Merhige, Jr.; and D. Dortch Warriner, District Judges.

Argued: November 3, 1981 Decided: August 9, 1982

Before WINTER, Chief Judge; FIELD, Senior Circuit Judge; and CHAPMAN, Circuit Judge.

Lewis T. Booker (Virginia W. Powell, L. Neal Ellis, Jr., Roger L. Gregory, Hunton & Williams; Marshall Coleman, Attorney General, Walter H. Ryland, Chief Deputy Attorney General on brief) for Appellants; Ellen Broadman (Alan Mark Silbergeld; James W. Benton, Jr., Hill, Tucker & Marsh on brief) for Appellants in No. 81-1156 and for Appellees in No. 81-1155; O. Randolph Rollins (Robert H. Patterson, Jr., Anne Marie Whittemore, Judith B. Henry, McGuire, Woods & Battle on brief) for Appellees.

FIELD, Senior Circuit Judge:

These appeals from the decision of the three-judge District Court come to us following two prior appeals to the Supreme Court of the United States during the pendency of this action. In the second appeal, *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), the Court held that Virginia's Disciplinary Rule (D.R.), 2-102(A)(6) of the Virginia Code of Professional Responsibility (Bar Code) unconstitutionally inhibited the gathering of information incident to the publication of a legal services directory, and that in this suit under 42 U.S.C. § 1983 the Consumers Union of the United States, Inc. (Consumers Union) was entitled to declaratory and injunctive relief against both the Virginia State Bar (Bar) and the Supreme Court of Virginia and its chief justice (Virginia Court). The sole question presented on these appeals is whether Consumers Union, having prevailed in its section 1983 action, is entitled to recover attorney's fees from the Bar and/or the Virginia Court under 42 U.S.C. § 1988.

This case had its inception in 1974, when Consumers Union attempted to prepare a directory of attorneys practicing in Arlington County, Virginia. However, attorneys contacted by Consumers Union declined to supply information for the directory fearing that it would violate the prohibition against attorney advertising contained in D.R. 2-102(A)(6). Consumers Union then instituted this action under section 1983 against the Virginia Court and the Bar requesting a declaratory judgment that they had violated Consumer Union's First and Fourteenth Amendment rights to gather, publish and receive factual information, and a permanent injunction against the enforcement of D.R. 2-102(A)(6).

On December 17, 1976 a three-judge District Court, convened pursuant to 28 U.S.C. § 2281, held that D.R. 2-102 (A)(6) unconstitutionally restricted the right of Consumers Union to receive and gather non-fee information and information concerning initial consultation fees. *Consumers Union of United States, Inc.* v. *American Bar Association,* 427 F. Supp. 506 (E.D. Va. 1976). In addition, the court permanently enjoined the Virginia Court and the Bar from enforcing D.R. 2-102(A)(6) except for the prohibition against advertising fees for services other than the initial consultation fee. *Id.,* at 523.

Consumers Union appealed the District Court's decision declining to enjoin enforcement of the fee advertising provision directly to the Supreme Court. The Virginia Court and the Bar filed a cross-appeal, contending that D.R. 2-102(A)(6) should have been upheld in its entirety. The Supreme Court vacated the judgment of the District Court and remanded the case for further consideration in light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), which it had decided after the appeals were filed. *Virginia*

State Bar v. *Consumers Union of the United States, Inc.*, 433 U.S. 917 (1977).

On remand, the Virginia Court and the Bar conceded that under *Bates*, D.R. 2-102(A)(6) could not be constitutionally enforced against attorneys from whom Consumers Union sought information for its directory. The District Court ruled that D.R. 2-102(A)(6) was unconstitutional on its face and permanently enjoined the Virginia Court and the Bar from enforcing it. *Consumers Union of United States, Inc.* v. *American Bar Association*, 470 F.Supp. 1055 (E.D. Va. 1979).

Consumers Union also requested that the District Court allow them reasonable attorney's fees pursuant to 42 U.S.C. § 1988. The District Court awarded attorney's fees against the Virginia Court, but concluded that special circumstances rendered such an award against the Bar unjust since it had previously petitioned the Virginia Court recommending amendments to the Bar Code Disciplinary Rules which the Bar believed would ensure the constitutionality of the Rules governing attorney advertising.

On June 7, 1979, the Virginia Court again appealed the District Court's judgment allowing declaratory and injunctive relief as well as attorney's fees against it. Consumers Union cross-appealed the District Court's decision refusing to award attorney's fees against the Bar. While upholding the declaratory and injunctive relief entered against the Virginia Court, the Supreme Court vacated and remanded the District Court's decision to assess attorney's fees against the Virginia Court. *Supreme Court of Virginia* v. *Consumers Union, supra.* In a separate order, the Court vacated the decision of the District Court not to award attorney's fees against the Bar and remanded the case for reconsideration

in light of its opinion in *Supreme Court of Virginia* v. *Consumers Union.*

Upon remand, the District Court reiterated its prior determination that the Virginia Court was liable to Consumers Union under section 1988 for attorney's fees, but again declined to award any fee against the Bar. *Consumers Union of the United States, Inc.* v. *American Bar Association,* 505 F.Supp. 822 (E.D. Va. 1981). Thereafter, the Virginia Court appealed the fee award entered against it both to the Supreme Court and to this Court. Consumers Union also cross-appealed that portion of the District Court's judgment denying a fee award against the Bar to the Supreme Court and to this Court. On May 26, 1981, the Supreme Court dismissed both appeals for lack of jurisdiction,[1] and, accordingly, at this juncture appellate jurisdiction rests solely with this Court.

In our consideration of these appeals we are, of course, guided largely by the observations of the Court in its opinion in *Supreme Court of Virginia* v. *Consumers Union, supra.* In vacating the District Court's award of attorney's fees against the Virginia Court, the Supreme Court noted that in regulating the Bar "the Virginia Court is exercising the State's entire legislative power...[in this respect], and its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity." 446 U.S. at 734. The Court went on to observe that if the

[1] *Supreme Court of Virginia* v. *Consumers Union of the United States,* 451 U.S. 1012 (1981); *Consumers Union of the United States* v. *Virginia State Bar,* 451 U.S. 1012 (1981). The Supreme Court did not have appellate jurisdiction under 28 U.S.C. § 1253 to entertain a direct appeal of the attorney's fee dispute since the question of injunctive relief sought pursuant to the section 1983 issue was no longer before the Court. *See Supreme Court of Virginia* v. *Consumers Union, supra* at 737, n. 16.

sole basis for the plaintiffs' action was the promulgation of the challenged rules, legislative immunity would preclude suit against the Virginia Court under section 1983.

With respect to the question of judicial immunity, the Court discerned no reason to resolve that issue, stating:

> We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were. (Footnote omitted).

Id., at 736. The Court then concluded that "because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case." (Footnote omitted). *Id.*, at 737.

The Court, finding that the District Court's award of attorney's fees was based on acts or omissions for which appellants enjoyed absolute immunity, vacated the award as erroneous. The Court concluded, however, that:

> This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. ***Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role.

Id., at 739.

Counsel for the Virginia Court contends that under the Supreme Court's decision it was incumbent upon the Dis-

trict Court upon remand to inquire into the question of whether the Virginia Court had, in fact, exercised its enforcement authority. Counsel further suggests that in the absence of evidence that the Virginia Court had acted in an enforcement capacity a "case or controversy" would not exist between it and Consumers Union. We agree with counsel for Consumers Union that these arguments are answered and foreclosed by the opinion of the Court itself. In regard to the latter contention, the Court specifically recognized the existence of a "case or controversy", stating:

> Of course, as *Boyle* v. *Landry, supra,* [401 U.S. 77 (1971)] and *O'Shea* v. *Littleton, supra,* [414 U.S. 488 (1974)] indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person* v. *Association of the Bar of New York,* 554 F.2d 534, 536-537 (CA2 1977).

Id., at 736, n. 15.

As we have noted, the Supreme Court found that on the record before it a fee award against the Virginia Court was appropriate in this case "absent some special circumstances". Upon its review of the record the District Court concluded that there were no special circumstances which would render an award of attorney's fees unjust under the rationale of *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), and we agree that under the standard of that case the award to Consumers Union as a prevailing civil rights plaintiff was appropriate and correct.

We, however, disagree with the decision of the District Court that special circumstances exist in this case which would render a fee award against the Bar unjust. In adhering to its original view, the District Court stated "[a]s before,

this conclusion is grounded on the Bar's endeavors to have the Bar Code amended to conform to constitutional standards." 505 F.Supp. at 823. If the basis of any fee award was the promulgation of the subject Rule, this ameliorative action of the Bar might render an award against it unfair. The approval of a fee award by the Supreme Court, however, was not based upon the legislative action of the Virginia Court in promulgating the Rule, but rested solely upon its direct enforcement role. Under the Virginia Disciplinary format, the Bar played an equally significant enforcement role which was recognized by the Court when it observed:

> We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.

446 U.S. at 739.

In the context of this controversy, we find it difficult to separate the activity of the Bar from that of the Virginia Court. The record shows that the Bar recommended the promulgation of the original unconstitutional rule, and took steps to amend the rule only after this lawsuit was instituted. It would fly in the face of the policy of section 1988 to recognize such a tardy response as a special circumstance which would preclude an award against the Bar. Nor can we overlook the fact that when the Bar was moved to act, the amendment it proposed would still have prohibited the publication of fees for routine legal services and thus would have continued to infringe the

First Amendment rights of the plaintiffs. There can be no doubt that in the area of enforcement there was a "case and controversy" between the Bar and Consumers Union. The record discloses that Consumers Union unsuccessfully sought a ruling from the Bar certifying the Directory as a "reputable publication," and a Virginia attorney was advised by the Bar that the Rule would not permit an attorney to give Consumers Union the information which it requested for the Directory.

It is now axiomatic that plaintiffs who prevail in actions brought under section 1983 are entitled to attorney's fees unless special circumstances would render such an award unjust, and the discretion of a district court in deciding whether to award such fees to a prevailing party is narrowly limited. *Bonnes* v. *Long*, 599 F.2d 1316 (4 Cir. 1979). Upon the record in this case the Bar as well as the Virginia Court was properly liable to the plaintiff by reason of the Bar's enforcement role, and we discern nothing which would reasonably support the conclusion that an award of attorney's fees against it would be unjust. Accordingly, we hold that it was an abuse of discretion for the District Court to decline an award of fees against the Bar.

The action of the District Court in awarding attorney's fees against the Virginia Court in Case No. 81-1155(L) is affirmed. The order of the District Court denying an award against the Bar in Case No. 81-1156 is reversed and the case is remanded for further proceedings consistent with this opinion.[2]

No. 81-1155(L) AFFIRMED.
No. 81-1156 REVERSED AND REMANDED.

[2] The fees to be fixed by the district court upon remand should, of course, include services rendered in these appeals as well as all of the prior proceedings, including the appeals to the Supreme Court of the United States.

CHAPMAN, Circuit Judge, dissenting:

I respectfully dissent and suggest that the majority of this court, as did the majority of the district court, has misread *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980). The three-judge district court in *Consumers Union of the U.S.* v. *American Bar Association*, 505 F.Supp. 822 (E.D.Va. 1981) referring to Consumers Union II[1] stated at 823:

> The Supreme Court vacated the award of attorney's fees because it rested in part on consideration of the Virginia Court's adoption, and retention even after *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977), of the disputed disciplinary provision—actions the Supreme Court held to enjoy absolute legislative immunity.

I do not read Consumers Union II as indicating that the attorney's fees awarded by the district court rested in part on its legislative-rule making role. The fees awarded by the three-judge district court rested entirely upon the rule making function of the Virginia Court and the court's enforcement role was not dismissed prior to the decision in Consumers Union II. The U. S. Supreme Court did not find that the Virginia Court was liable for attorney's fees in its direct enforcement role or that such enforcement role played any part in awarding of fees. If this had been the finding, the court would have either affirmed or would have remanded with directions to the district court to find a proper fee.

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[1] This is a 1980 decision of the Supreme Court and so designated as to keep down confusion with Consumers Union I, decided in 1977, and Consumers Union III, decided in 1981. I assume there will be a Consumers IV at some date in the future.

The Supreme Court did neither, but stated at page 738:

> We are unable to agree that the attorney's fees should have been awarded for the reasons relied on by the district court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the district court's award of attorney's fees in this case was premised on acts or omissions for which appellants enjoyed absolute legislative immunity. This was error.

At 739 the court makes it equally clear that the court's enforcement role was not a part of the prior fee award:

> Because the Virginia court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

The court went on to say:

> This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case.

Therefore, the Supreme Court must have remanded for reconsideration of the enforcement role based upon something that was not in the existing record. With no addition to the record, the district court found that the Virginia Supreme Court was liable solely upon its enforcement role under the statute.

There is a difference between a statement by the Supreme Court that a party is subject to suit and a conclusion by the court that such party is liable as a result of the suit. The

majority of the district court, and the majority of this court, seem to have crossed the chasm between being subject to suit and liable as a result of the suit without pausing to find what the party did to become liable.

The only allegation in the complaint relating to the Supreme Court of Virginia reads:

> Defendant Supreme Court of Virginia adopted and promulgated the State Bar Code, purporting to act under authority of § 54-48 of the Virginia Code.

There is no contention that the Virginia Court used or threatened to use its enforcement power against Consumer's Union or any member of the Virginia Bar for supplying information to Consumers Union.

Without some finding that the Virginia Court has used its "direct enforcement role" I do not see how it can be held responsible for attorney's fees under the language of the Supreme Court in Consumers Union II.

I find myself totally in agreement with the conclusion of Judge Warriner in his dissent:

> In summary, I believe it is an abuse of discretion to award attorney's fees against the Virginia Court for not doing that which it was not alleged to have done; for not doing that which it was not proved to have done; for not doing that which, as against plaintiffs, it could not have done; and for not doing that which, in practice, it rarely does. Such an award would do nothing to further the purposes of § 1988 to encourage "private attorney general" suits. Rather, an award against the Virginia court in its so-called enforcement role, based upon the record in this case, would simply be a determination that the fee should be paid by the Virginia court without regard to the justice of the case. 505 F.Supp. at 829.

For the past three years this suit has been nothing but an effort by the plaintiff's attorneys to establish a theory upon which they could collect a fee. In the spring of 1979 the last possible impediment to gathering the information and publishing the Attorney's Directory for Arlington County was removed. However, when this case was argued in November 1981 the directory had not been printed or distributed. As a result of numerous questions by the court to the attorneys for Consumers Union, the information has been gathered and the directory published. A copy of the directory was forwarded to this court on June 15, 1982. It contains the names of 78 attorneys in Arlington, Virginia. This action has made three trips to the United States Supreme Court, and is presently on its way back to the Supreme Court, all to produce 78 names.

I would affirm the district court's finding that special circumstances rendered a fee award unjust as against the Virginia State Bar for the reasons set forth in the district court's opinion.

I am concerned by and dissent from footnote No. 2 of the majority opinion of this court which seems to indicate that the attorneys are entitled to fees for all services rendered, even those services in pursuing an invalid theory of the law. The district court was very careful to state that the attorney's fees would be "for services of its counsel in this action in so far as such services were performed to prevent the enforcement of the Rule." It is obvious from the record that these attorneys did not even consider enforcement until this case was almost concluded and then had the matter of enforcement called to their attention by the United States Supreme Court. I am uncertain in reading the majority opinion as to whether the attorney's fees shall be restricted to prevention of enforcement of the Rule or

whether the attorneys are to be compensated for all services performed from the beginning of this litigation.

I would remand the case to the district court with instructions to expand the record and determine whether the Virginia Court ever exercised its direct enforcement role.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1155

CONSUMERS UNION OF UNITED STATES, INC., ET AL,
Appellees,

versus

VIRGINIA STATE BAR, ET AL.,
Defendants,

and

SUPREME COURT OF VIRGINIA, ET AL,
Appellants.

No. 81-1156

CONSUMERS UNION OF UNITED STATES, INC., ET AL,
Appellants,

versus

VIRGINIA STATE BAR, ET AL.,
Appellees,

and

SUPREME COURT OF VIRGINIA, ET AL,
Defendants.

ORDER

Upon consideration of the petitions for rehearing and sugestions for rehearing en banc filed on behalf of the Virginia State Bar, et al, and the Supreme Court of Virginia, et al,

IT IS ORDERED that the petitions for rehearing are denied. Chief Judge Winter and Judge Field voted in favor of the denial and Judge Chapman voted to grant rehearing.

IT IS FURTHER ORDERED that the suggestions for rehearing en banc are denied. Chief Judge Winter, Judge Butzner, who voted before he took senior status, Judge Phillips, Judge Murnaghan, Judge Sprouse and Judge Ervin voted to deny rehearing en banc while Judge Russell, Judge Hall, and Judge Chapman voted to grant rehearing en banc. Judge Widener was disqualified from voting.

Entered at the direction of Judge Field.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk